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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 BENJAMIN FLOURNOY,
12 CDCR #F-25814,

13 Plaintiff,

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15 vs.

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17 J. MANNING, et al.,
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19 Defendants.
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Civil No. 10cv1235 MMA (WMc)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,**
[Doc. No. 2];

**(2) SUA SPONTE DISMISSING
COMPLAINT FOR FAILING TO
STATE A CLAIM PURSUANT
TO 28 U.S.C. §§ 1915(e)(2)
& 1915A(b); and**

**(3) DENYING MOTION TO
RECTIFY/CLARIFY AS MOOT**

[Doc. No. 3]

23 Plaintiff, Benjamin Flournoy, a state prisoner currently incarcerated at California State
24 Prison, Los Angeles County (“CAL-LAC”) located in Lancaster, California and proceeding pro
25 se, has filed a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff alleges that his
26 constitutional rights were violated when he was housed at Calipatria State Prison in 2009.
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1 Plaintiff has not prepaid the \$350 civil filing fee required by 28 U.S.C. § 1914(a); instead
 2 he has filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a),
 3 along with a “Motion to Rectify/Correct Amount of Damages.” [Doc. Nos. 2, 3]

4 **I.**

5 **MOTION TO PROCEED IFP [Doc. No. 2]**

6 All parties instituting any civil action, suit or proceeding in a district court of the United
 7 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
 8 U.S.C. § 1914(a). An action may proceed despite a party’s failure to prepay the entire fee only
 9 if the party is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
 10 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Prisoners granted leave to proceed IFP however,
 11 remain obligated to pay the entire fee in installments, regardless of whether the action is
 12 ultimately dismissed for any reason. *See* 28 U.S.C. § 1915(b)(1) & (2).

13 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a
 14 prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account
 15 statement (or institutional equivalent) for the prisoner for the six-month period immediately
 16 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2). From the certified trust account
 17 statement, the Court must assess an initial payment of 20% of (a) the average monthly deposits
 18 in the account for the past six months, or (b) the average monthly balance in the account for the
 19 past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C.
 20 § 1915(b)(1); 28 U.S.C. § 1915(b)(4). That institution having custody of the prisoner must
 21 collect subsequent payments, assessed at 20% of the preceding month’s income, in any month
 22 in which the prisoner’s account exceeds \$10, and forward those payments to the Court until the
 23 entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

24 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.
 25 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to
 26 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff’s trust account statement shows that
 27 he has a current balance of zero and therefore insufficient funds from which to pay filing fees
 28 at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be

1 prohibited from bringing a civil action or appealing a civil action or criminal judgment for the
 2 reason that the prisoner has no assets and no means by which to pay the initial partial filing
 3 fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve”
 4 preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay . . . due to the lack
 5 of funds available to him when payment is ordered.”).

6 Accordingly, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP [Doc. No. 2] and
 7 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350
 8 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the Court
 9 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

10 **II.**

11 **SUA SPONTE SCREENING PER 28 U.S.C. § 1915(e)(2) AND § 1915A**

12 **A. Standard**

13 The PLRA also obligates the Court to review complaints filed by all persons proceeding
 14 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused
 15 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
 16 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
 17 practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
 18 provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any portion
 19 thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from
 20 defendants who are immune. *See* 28 U.S.C. § 1915(e)(2)(B) and § 1915A; *Lopez v. Smith*, 203
 21 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443,
 22 446 (9th Cir. 2000) (§ 1915A).

23 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte
 24 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is
 25 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,
 26 324 (1989). However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing
 27 an IFP or prisoner’s suit make and rule on its own motion to dismiss before effecting service of
 28 the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection

1 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint
 2 that fails to state a claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)
 3 (discussing 28 U.S.C. § 1915A).

4 “[W]hen determining whether a complaint states a claim, a court must accept as true all
 5 allegations of material fact and must construe those facts in the light most favorable to the
 6 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
 7 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s
 8 duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,
 9 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*
 10 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

11 **B. Eighth Amendment claims**

12 Plaintiff claims that on September 18, 2009, “the ventilation system was turned off, due
 13 to Plaintiff’s heart problems, it became difficult to breathe.” (Compl. at 4.) “The unnecessary
 14 and wanton infliction of pain upon incarcerated individuals under color of law constitutes a
 15 violation of the Eighth Amendment.” *Toguchi v. Chung*, 391 F.3d 1051, 1056-57 (9th Cir. 2004)
 16 (citing *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992)). A violation of the Eighth
 17 Amendment occurs when prison officials are deliberately indifferent to a prisoner’s medical
 18 needs. *Id.*; *see also Estelle v. Gamble*, 429 U.S. 97, 105 (1976).

19 To allege an Eighth Amendment violation, a prisoner must “satisfy both the objective
 20 and subjective components of a two-part test.” *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir.
 21 2002) (citation omitted). First, he must allege that prison officials deprived him of the “minimal
 22 civilized measure of life’s necessities.” *Id.* (citation omitted). Second, he must allege the prison
 23 official “acted with deliberate indifference in doing so.” *Id.* (citation and internal quotation
 24 marks omitted).

25 A prison official acts with “deliberate indifference ... only if [he is alleged to] know[] of
 26 and disregard[] an excessive risk to inmate health and safety.” *Gibson v. County of Washoe,*
 27 *Nevada*, 290 F.3d 1175, 1187 (9th Cir. 2002) (citation and internal quotation marks omitted).
 28 Under this standard, the official must be alleged to “be aware of facts from which the inference

1 could be drawn that a substantial risk of serious harm exist[ed],” and must also be alleged to
 2 also have drawn that inference. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). “If a [prison
 3 official] should have been aware of the risk, but was not, then the [official] has not violated the
 4 Eighth Amendment, no matter how severe the risk.” *Gibson*, 290 F.3d at 1188 (citation
 5 omitted). This “subjective approach” focuses only “on what a defendant’s mental attitude
 6 actually was.” *Farmer*, 511 U.S. at 839. “Mere negligence in diagnosing or treating a medical
 7 condition, without more, does not violate a prisoner’s Eighth Amendment rights.” *McGuckin*,
 8 974 F.2d at 1059 (alteration and citation omitted).

9 Here, Plaintiff fails to describe with any specificity the nature of his alleged serious
 10 medical need. Plaintiff says he has “heart problems” but does not clarify the nature of his
 11 condition. Thus, there are no facts from which this Court could find that Plaintiff has a serious
 12 medical need. Moreover, Plaintiff fails to describe with any specificity whether he suffered any
 13 harm as a result of the lack of ventilation. If Plaintiff is attempting to allege that there was a
 14 delay in treatment, there are no facts in the Complaint from which the Court can determine
 15 whether he has suffered any injury as a result of the Defendants alleged delay in providing
 16 treatment. *See Shapley v. Nevada Bd. of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir.
 17 1985) (a prisoner can make “no claim for deliberate medical indifference unless the denial was
 18 harmful.”) Plaintiff has failed to allege any facts from which the Court could find that
 19 Defendants acted with deliberate indifference to his serious medical needs.

20 C. Retaliation

21 Plaintiff also alleges that he was subjected to “retaliatory abuse” by prison officials. In
 22 order to prevail on a claim of retaliation, Plaintiff must be able to prove the following five
 23 factors: “(1) An assertion that a state actor took some adverse action against [Plaintiff]; (2)
 24 because of (3) [Plaintiff’s] protected conduct, and that such action (4) chilled [Plaintiff’s]
 25 exercise of his First Amendment rights, and (5) the action did not reasonably advance a
 26 legitimate correctional goal.” *See Rhodes v. Robinson*, 408 F.3d 559, 567-568 (9th Cir. 2005).
 27 (citing *Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000); *Barnett v. Centoni*, 31 F.3d 813,
 28 815-16 (9th Cir. 1994) (per curiam)). Plaintiff has alleged no facts to suggest that the actions

1 of Defendants did not reasonably advance a legitimate correctional goal nor does Plaintiff allege
 2 any facts to show that his First Amendment rights were “chilled.” Thus, Plaintiff’s First
 3 Amendment retaliation claims are dismissed for failing to state a claim upon which § 1983 relief
 4 can be granted.

5 Accordingly, the Court must DISMISS Plaintiff’s Complaint for all the reasons set forth
 6 above but will provide Plaintiff with the opportunity to amend his Complaint to correct the
 7 deficiencies of pleading identified by the Court. Because the Court is providing Plaintiff leave
 8 to file an Amended Complaint, Plaintiff’s “Motion to Rectify/Correct Amount of Damages” is
 9 **DENIED** as moot.

10 **III.**

11 **CONCLUSION AND ORDER**

12 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

13 1. Plaintiff’s Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]
 14 is **GRANTED**.

15 2. The Secretary of the California Department of Corrections and Rehabilitation, or
 16 his designee, is ordered to collect from Plaintiff’s prison trust account the \$350 balance of the
 17 filing fee owed in this case by collecting monthly payments from the trust account in an amount
 18 equal to twenty percent (20%) of the preceding month’s income credited to the account and
 19 forward payments to the Clerk of the Court each time the amount in the account exceeds \$10 in
 20 accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY
 21 IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

22 3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
 23 Secretary, California Department of Corrections and Rehabilitation, P.O. Box 942883,
 24 Sacramento, California, 94283-0001.

25 **IT IS FURTHER ORDERED** that:

26 4. Plaintiff’s Complaint is **DISMISSED** without prejudice for failing to state a claim
 27 upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b).
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1 However, Plaintiff is further **GRANTED** forty five (45) days leave from the date this Order is
2 filed in which to file a First Amended Complaint which cures all the deficiencies of pleading
3 noted above. Plaintiff's Amended Complaint must be complete in itself without reference to his
4 previous pleading. *See* S.D. CAL. CIVLR 15.1. Defendants not named and all claims not re-
5 alleged in the Amended Complaint will be considered waived. *See King v. Atiyeh*, 814 F.2d 565,
6 567 (9th Cir. 1987).

7 5. Plaintiff's "Motion to Rectify/Correct Amount of Damages is **DENIED** [Doc. No.
8 3] as moot.

9 6. The Clerk of Court is directed to mail a court approved form § 1983 complaint to
10 Plaintiff.

11 **IT IS SO ORDERED.**

12 DATED: July 8, 2010

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14 Hon. Michael M. Anello
15 United States District Judge
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